

§ 11.14

a dollar amount for the injuries established in the Injury Determination phase and measured in the Quantification phase. The sections of subpart E of this part comprising the Damage Determination phase include guidance on acceptable cost estimating and valuation methodologies for determining compensation based on the costs of restoration, rehabilitation, replacement, and/or acquisition of equivalent resources, plus, at the discretion of the authorized official, compensable value, as defined in § 11.83(c) of this part.

(f) *Post-assessment phase.* Subpart F of this part includes requirements to be met after the assessment is complete. The Report of Assessment contains the results of the assessment, and documents that the assessment has been carried out according to this rule. Other post-assessment requirements delineate the manner in which the demand for a sum certain shall be presented to a responsible party and the steps to be taken when sums are awarded as damages.

[51 FR 27725, Aug. 1, 1986, as amended at 59 FR 14281, Mar. 25, 1994]

§ 11.14 Definitions.

Terms not defined in this section have the meaning given by CERCLA or the CWA. As used in this part, the phrase:

(a) *Acquisition of the equivalent or replacement* means the substitution for an injured resource with a resource that provides the same or substantially similar services, when such substitutions are in addition to any substitutions made or anticipated as part of response actions and when such substitutions exceed the level of response actions determined appropriate to the site pursuant to the NCP.

(b) *Air or air resources* means those naturally occurring constituents of the atmosphere, including those gases essential for human, plant, and animal life.

(c) *Assessment area* means the area or areas within which natural resources have been affected directly or indirectly by the discharge of oil or release of a hazardous substance and that serves as the geographic basis for the injury assessment.

43 CFR Subtitle A (10–1–03 Edition)

(d) *Authorized official* means the Federal or State official to whom is delegated the authority to act on behalf of the Federal or State agency designated as trustee, or an official designated by an Indian tribe, pursuant to section 126(d) of CERCLA, to perform a natural resource damage assessment. As used in this part, authorized official is equivalent to the phrase “authorized official or lead authorized official,” as appropriate.

(e) *Baseline* means the condition or conditions that would have existed at the assessment area had the discharge of oil or release of the hazardous substance under investigation not occurred.

(f) *Biological resources* means those natural resources referred to in section 101(16) of CERCLA as fish and wildlife and other biota. Fish and wildlife include marine and freshwater aquatic and terrestrial species; game, nongame, and commercial species; and threatened, endangered, and State sensitive species. Other biota encompass shellfish, terrestrial and aquatic plants, and other living organisms not otherwise listed in this definition.

(g) *CERCLA* means the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9601 *et seq.*, as amended.

(h) *Committed use* means either: a current public use; or a planned public use of a natural resource for which there is a documented legal, administrative, budgetary, or financial commitment established before the discharge of oil or release of a hazardous substance is detected.

(i) *Control area or control resource* means an area or resource unaffected by the discharge of oil or release of the hazardous substance under investigation. A control area or resource is selected for its comparability to the assessment area or resource and may be used for establishing the baseline condition and for comparison to injured resources.

(j) *Cost-effective or cost-effectiveness* means that when two or more activities provide the same or a similar level of benefits, the least costly activity providing that level of benefits will be selected.

(k) *CWA* means the Clean Water Act, as amended, 33 U.S.C. 1251 *et seq.*, also referred to as the Federal Water Pollution Control Act.

(l) *Damages* means the amount of money sought by the natural resource trustee as compensation for injury, destruction, or loss of natural resources as set forth in section 107(a) or 111(b) of CERCLA.

(m) *Destruction* means the total and irreversible loss of a natural resource.

(n) *Discharge* means a discharge of oil as defined in section 311(a)(2) of the CWA, as amended, and includes, but is not limited to, any spilling, leaking, pumping, pouring, emitting, emptying, or dumping of oil.

(o) *Drinking water supply* means any raw or finished water source that is or may be used by a public water system, as defined in the SDWA, or as drinking water by one or more individuals.

(p) *EPA* means the U.S. Environmental Protection Agency.

(q) *Exposed to or exposure of* means that all or part of a natural resource is, or has been, in physical contact with oil or a hazardous substance, or with media containing oil or a hazardous substance.

(r) *Fund* means the Hazardous Substance Superfund established by section 517 of the Superfund Amendments and Reauthorization Act of 1986.

(s) *Geologic resources* means those elements of the Earth's crust such as soils, sediments, rocks, and minerals, including petroleum and natural gas, that are not included in the definitions of ground and surface water resources.

(t) *Ground water resources* means water in a saturated zone or stratum beneath the surface of land or water and the rocks or sediments through which ground water moves. It includes ground water resources that meet the definition of drinking water supplies.

(u) *Hazardous substance* means a hazardous substance as defined in section 101(14) of CERCLA.

(v) *Injury* means a measurable adverse change, either long- or short-term, in the chemical or physical quality or the viability of a natural resource resulting either directly or indirectly from exposure to a discharge of oil or release of a hazardous substance, or exposure to a product of reactions

resulting from the discharge of oil or release of a hazardous substance. As used in this part, injury encompasses the phrases "injury," "destruction," and "loss." Injury definitions applicable to specific resources are provided in § 11.62 of this part.

(w) *Lead authorized official* means a Federal or State official authorized to act on behalf of all affected Federal or State agencies acting as trustees where there are multiple agencies, or an official designated by multiple tribes where there are multiple tribes, affected because of coexisting or contiguous natural resources or concurrent jurisdiction.

(x) *Loss* means a measurable adverse reduction of a chemical or physical quality or viability of a natural resource.

(y) *Natural Contingency Plan* or *NCP* means the National Oil and Hazardous Substances Contingency Plan and revisions promulgated by EPA, pursuant to section 105 of CERCLA and codified in 40 CFR part 300.

(z) *Natural resources* or *resources* means land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States (including the resources of the fishery conservation zone established by the Magnuson Fishery Conservation and Management Act of 1976), any State or local government, any foreign government, any Indian tribe, or, if such resources are subject to a trust restriction on alienation, any member of an Indian tribe. These natural resources have been categorized into the following five groups: Surface water resources, ground water resources, air resources, geologic resources, and biological resources.

(aa) *Natural resource damage assessment* or *assessment* means the process of collecting, compiling, and analyzing information, statistics, or data through prescribed methodologies to determine damages for injuries to natural resources as set forth in this part.

(bb) *Oil* means oil as defined in section 311(a)(1) of the CWA, as amended, of any kind or in any form, including, but not limited to, petroleum, fuel oil,

§ 11.14

sludge, oil refuse, and oil mixed with wastes other than dredged spoil.

(cc) *On-Scene Coordinator* or *OSC* means the On-Scene Coordinator as defined in the NCP.

(dd) *Pathway* means the route or medium through which oil or a hazardous substance is or was transported from the source of the discharge or release to the injured resource.

(ee) *Reasonable cost* means the amount that may be recovered for the cost of performing a damage assessment. Costs are reasonable when: the Injury Determination, Quantification, and Damage Determination phases have a well-defined relationship to one another and are coordinated; the anticipated increment of extra benefits in terms of the precision or accuracy of estimates obtained by using a more costly injury, quantification, or damage determination methodology are greater than the anticipated increment of extra costs of that methodology; and the anticipated cost of the assessment is expected to be less than the anticipated damage amount determined in the Injury, Quantification, and Damage Determination phases.

(ff) *Rebuttable presumption* means the procedural device provided by section 107(f)(2)(C) of CERCLA describing the evidentiary weight that must be given to any determination or assessment of damages in any administrative or judicial proceeding under CERCLA or section 311 of the CWA made by a Federal or State natural resource trustee in accordance with the rule provided in this part.

(gg) *Recovery period* means either the longest length of time required to return the services of the injured resource to their baseline condition, or a lesser period of time selected by the authorized official and documented in the Assessment Plan.

(hh) *Release* means a release of a hazardous substance as defined in section 101(22) of CERCLA.

(ii) *Replacement or acquisition of the equivalent* means the substitution for an injured resource with a resource that provides the same or substantially similar services, when such substitutions are in addition to any substitutions made or anticipated as part of response actions and when such substi-

43 CFR Subtitle A (10-1-03 Edition)

tutions exceed the level of response actions determined appropriate to the site pursuant to the NCP.

(jj) *Response* means remove, removal, remedy, or remedial actions as those phrases are defined in sections 101(23) and 101(24) of CERCLA.

(kk) *Responsible party or parties* and *potentially responsible party or parties* means a person or persons described in or potentially described in one or more of the categories set forth in section 107(a) of CERCLA.

(ll) *Restoration or rehabilitation* means actions undertaken to return an injured resource to its baseline condition, as measured in terms of the injured resource's physical, chemical, or biological properties or the services it previously provided, when such actions are in addition to response actions completed or anticipated, and when such actions exceed the level of response actions determined appropriate to the site pursuant to the NCP.

(mm) *SDWA* means the Safe Drinking Water Act, 42 U.S.C. 300f-300j-10.

(nn) *Services* means the physical and biological functions performed by the resource including the human uses of those functions. These services are the result of the physical, chemical, or biological quality of the resource.

(oo) *Site* means an area or location, for purposes of response actions under the NCP, at which oil or hazardous substances have been stored, treated, discharged, released, disposed, placed, or otherwise came to be located.

(pp) *Surface water resources* means the waters of the United States, including the sediments suspended in water or lying on the bank, bed, or shoreline and sediments in or transported through coastal and marine areas. This term does not include ground water or water or sediments in ponds, lakes, or reservoirs designed for waste treatment under the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. 6901-6987 or the CWA, and applicable regulations.

(qq) *Technical feasibility* or *technically feasible* means that the technology and management skills necessary to implement an Assessment Plan or Restoration and Compensation Determination Plan are well known and that each element of the plan has a reasonable

chance of successful completion in an acceptable period of time.

(rr) *Trustee or natural resource trustee* means any Federal natural resources management agency designated in the NCP and any State agency designated by the Governor of each State, pursuant to section 107(f)(2)(B) of CERCLA, that may prosecute claims for damages under section 107(f) or 111(b) of CERCLA; or an Indian tribe, that may commence an action under section 126(d) of CERCLA.

(ss) *Type A assessment* means standard procedures for simplified assessments requiring minimal field observation to determine damages as specified in section 301(c)(2)(A) of CERCLA.

(tt) *Type B assessment* means alternative methodologies for conducting assessments in individual cases to determine the type and extent of short- and long-term injury and damages, as specified in section 301(c)(2)(B) of CERCLA.

(uu) *Indian tribe* means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village but not including any Alaska Native regional or village corporation, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

[51 FR 27725, Aug. 1, 1986, as amended at 53 FR 5171, Feb. 22, 1988; 59 FR 14281, Mar. 25, 1994]

§ 11.15 What damages may a trustee recover?

(a) In an action filed pursuant to section 107(f) or 126(d) of CERCLA, or sections 311(f) (4) and (5) of the CWA, a natural resource trustee who has performed an assessment in accordance with this rule may recover:

(1) Damages as determined in accordance with this part and calculated based on injuries occurring from the onset of the release through the recovery period, less any mitigation of those injuries by response actions taken or anticipated, plus any increase in injuries that are reasonably unavoidable as a result of response actions taken or anticipated;

(2) The costs of emergency restoration efforts under § 11.21 of this part;

(3) The reasonable and necessary costs of the assessment, to include:

(i) The cost of performing the preassessment and Assessment Plan phases and the methodologies provided in subpart D or E of this part; and

(ii) Administrative costs and expenses necessary for, and incidental to, the assessment, assessment planning, and restoration, rehabilitation, replacement, and/or acquisition of equivalent resources planning, and any restoration, rehabilitation, replacement, and/or acquisition of equivalent resources undertaken; and

(4) Interest on the amounts recoverable as set forth in section 107(a) of CERCLA. The rate of interest on the outstanding amount of the claim shall be the same rate as is specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of the Internal Revenue Code of 1954. Such interest shall accrue from the later of: The date payment of a specified amount is demanded in writing, or the date of the expenditure concerned;

(b) The determination of the damage amount shall consider any applicable limitations provided for in section 107(c) of CERCLA.

(c) Where an assessment determines that there is, in fact, no injury, as defined in § 11.62 of this part, the natural resource trustee may not recover assessment costs.

(d) There shall be no double recovery under this rule for damages or for assessment costs, that is, damages or assessment costs may only be recovered once, for the same discharge or release and natural resource, as set forth in section 107(f)(1) of CERCLA.

(e) Actions for damages and assessment costs shall comply with the statute of limitations set forth in section 113(g), or, where applicable, section 126(d) of CERCLA.

[51 FR 27725, Aug. 1, 1986, as amended at 52 FR 9095, Mar. 20, 1987; 53 FR 5172, Feb. 22, 1988; 59 FR 14281, Mar. 25, 1994; 61 FR 20609, May 7, 1996]